

OCT 22 1979

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-650**

HERMINIO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ALLAN A. ACKERMAN, ESQ.

100 North LaSalle Street
Suite 611

Chicago, Illinois 60602
(312) 332-2863

*Attorney for Petitioner,
Herminio Cruz.*

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**PETITION FOR WRIT OF CERTIORARI TO THE
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Herminio Cruz, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals (Group Appendix A, *infra*, pp. 1a-6a) is not yet reported.

JURISDICTION

The Opinion of the Court of Appeals for the Seventh Circuit was entered on August 17, 1979. A timely Petition for Rehearing was filed [after an extension allowed by the Court] on September 10, 1979. The Petition for Rehearing was denied on October 2, 1979. This petition is filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment [self-incrimination] and Sixth Amendment [right to counsel] rights were violated where the trial court allowed a post-arrest oral admission into evidence where the evidence revealed that the petitioner was already in custody and had requested counsel . . . prior to the [controverted] oral admission?

1A. Whether a custodial request for counsel precludes the admission of the post-arrest statement in accordance with both *Fare v. Michael*, U.S., 99 S.Ct. 2560 (1979) and *North Carolina v. Butler*, U.S., 99 S.Ct. 1755 (1979)? [In *Butler* the Court noted that at no time did the respondent request counsel . . . 99 S.Ct. at 1756].

1B. Whether the Fifth Circuit *Miranda* interpretation in *U.S. v. Priest*, 409 F.2d 491 (C.A. 5, 1969), is correct [compelling suppression of post-arrest admission after request for counsel] and, if it is, does it so seriously conflict with the decision at bar that certiorari should be

granted to resolve the conflict of opinions within the circuits as to the proper application of *Miranda*?

2. Whether certiorari is appropriate to resolve the question as to whether the trial court must, consistent with 18 U.S.C. § 3501(a), instruct the trial jury on who has the burden of proof and what is the burden of proof where the government offers a controverted oral admission as evidence of guilt?

2A. Whether an instruction to the trial jury regarding a contested oral admission [post-arrest and without counsel] is complete and adequate under federal standards where the trial court declines to charge the proponent of the oral admission with any burden of proof whatsoever?

3. Whether an affidavit for a search warrant which contains serious material factual errors can survive review since *Franks v. Delaware*, 438 U.S., 98 S.Ct. 2674 (1978)?

3A. Whether petitioner was improperly denied "standing" to attack an affidavit for a search warrant where the affidavit contained information from a confidential informer . . . the confidential informer being an alleged court authorized wiretap . . . and where the United States Courts reported that the same wiretap was never installed?

3B. Whether the Court of Appeals committed error in declining to grant petitioner standing to attack an affidavit for a search warrant where the affidavit contained "electronic eavesdropping representations" under the theory that petitioner was not an "aggrieved person" as per 18 U.S.C. § 2510(11) but failed to challenge petitioner's standing to attack the same affidavit as a "person aggrieved" under Rule 41(e), Fed.R.Crim.Proc.?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 2510. Definitions

As used in this chapter—

(1) “wire communication” means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) “oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) “intercept” means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) “electronic, mechanical, or other device” means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212.

18 U.S.C. § 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the

custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Added Pub.L. 90-351, Title II, § 701(a), June 19, 82 Stat. 210, and amended Pub.L. 90-578, Title III, § 301(a) (3), Oct. 17, 1968, 82 Stat. 1115.

Rule 41, Fed.R.Crim.Proc., in part, states:

Rule 41.

SEARCH AND SEIZURE

(a) **Authority to Issue Warrant.** A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) **Property Which May Be Seized With a Warrant.** A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) **Issuance and Contents.**

(1) **Warrant upon Affidavit.** A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United

States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant upon oral testimony—

(A) General Rule.—If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application.—The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such a magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance.—If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and certification of testimony.—When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents.—The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional rule for execution.—The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to suppress precluded.—Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

(d) Execution and Return with Inventory. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accom-

panied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

STATEMENT OF THE CASE

(A)

Overview

Herminio Cruz (hereinafter Petitioner), was indicted for federal drug violations both in Chicago and Boston, Massachusetts, in 1977. Petitioner stood trial in December, 1977, in the Federal District Court in Chicago, Illinois, and from that conviction and sentence¹ [and the affirmation of same in the Court of Appeals for the Seventh Circuit] cometh this petition. In January, 1978, after the Chicago trial petitioner was set to trial in the Federal District Court in Massachusetts for an offense [conspiracy under 21 U.S.C. § 846] that petitioner claimed was . . . part and parcel . . . of the Chicago trial. Petitioner's *pretrial* motion to dismiss on double jeopardy grounds was denied and the Court of Appeals for the First Circuit affirmed the trial court order, *U.S. v. Cruz*, 568 F.2d 781 (C.A. 1, 1978). In March, 1978, petitioner had a "stipulated bench trial" before the Honorable Judge Freedman in Boston and petitioner was convicted and sentenced.² Petitioner again sought review in the Court of Appeals for the First Circuit and that Court affirmed petitioner's conviction, *U.S. v. Cruz*, 594 F.2d 268 (C.A. 1, 1979). A substantial review of this case has been submitted to this

¹ Petitioner, indicted in Chicago under 21 U.S.C. § 841(a)(1), in a single count indictment [76 CR 1285] was charged with possessing, with intent to deliver heroin on December 16, 1976. His sentence, on conviction, was fifteen (15) years in custody and a \$25,000 committed fine. The indictment is reproduced in the original record at O.R. 3.

² Fifteen (15) years in custody concurrent with the earlier fifteen (15) year sentence imposed after the Chicago trial.

Court in *Cruz v. U.S.*, cert. petition, 78-1504.³ Out of respect for brevity we shall not unnecessarily repeat that which has been proffered the Court under certiorari petition 78-1504.

(B)

Proceedings Below

The proceedings below, insofar as they relate to the issues and arguments raised in this petition, came forth during a series of pretrial hearings held before the trial judge from December 19-22, 1977. Those hearings yielded the following:

(1) On December 15, 1976, DEA agents in the Massachusetts area learned from a confidential informant that heroin was available in the Chicago area for \$28,000 per kilogram. An Eastern DEA agent learned from the same confidential informant that a lady named Daisy Gonzales was coming to Chicago on December 16, 1976, on a T.W.A. flight;

(2) Based upon the information from the confidential informant Daisy Gonzales was placed under surveillance when she arrived in Chicago during the morning hours of December 16, 1976;

(3) The events of December, 1976, are in large part traced directly to the affidavit for the search warrant which is reproduced as Group Appendix C, *infra*.

The confidential informant whose information is particularly reproduced in paragraphs 2 and 3 of the affidavit was not at all a confidential informant . . . but,

³ Petitioner sought bail pending certiorari and the motion was conditionally denied by Justice Brennan on the representation by the government that they would not seek petitioner's remandment to custody pending that petition for certiorari.

rather, was an *alleged* operative court authorized wiretap out of Boston, Massachusetts.⁴

The pretrial hearings demonstrated that the petitioner was arrested on private premises in Chicago at about 9:45 p.m. on December 16, 1976. The premises described in the warrant [2514 West Haddon Street, Chicago] were the premises searched. That is where the petitioner was arrested. The hearings showed that upon the execution of the warrant a quantity of heroin was recovered hidden in the basement area of the private home (O.Tr. 17-27). Petitioner, under arrest, was driven to DEA Headquarters in Chicago. This was at approximately 11:00 p.m. on December 16, 1976. The pretrial hearings contain the testimony of several DEA agents on the issue of petitioner's "right to counsel". DEA Agent Chavez, during these pretrial hearings, testified that at about 11:45 p.m., while Cruz was in custody and at the DEA Headquarters the following occurred (O.Tr. 397-401). Chavez testified as follows:

"Q. Now, is that the form which you read to the defendant Herminio Cruz in the Spanish language on the 16th day of December of 1976, sir?

A. It appears to be the form, yes.

Q. Now, Agent Chavez, you testified that you then gave the form to the defendant. What if anything did you observe him do with that form?

A. He appeared to read it.

Q. Did he say anything after doing so?

A. Yes, sir. He stated that he would not sign any documents unless his lawyer was present." (Tr. 401)

* * *

⁴ Both the search warrant and the affidavit are found at O.R. 9 in record 78-1257. A second record 78-2178 includes post-verdict matters raised on direct appeal . . . but not involved in this petition. All references to the record are 78-1257 only.

“Q. In any event, did you have anything to do with the preparation of that report?

A. I signed off on it as a group—as an acting group supervisor.

Q. Do you find anything in the first two paragraphs which indicates that he refused to sign the waiver of rights form because he wanted an attorney?

A. No, sir. I don't.

Q. Now, at what point in time did he refuse to sign because he wanted an attorney, do you recall?

A. After he was advised of his rights, he was allowed to read the statement of rights sheet.

Q. Subsequent to his refusal to execute it because of the lack of a lawyer, Agent Jimenez then spoke to him again?

A. That is correct.

Q. Thereafter, after Agent Jimenez spoke to him again, some statement which the government intends to introduce was actually made, is that correct?

A. That is correct.

Q. It was thereafter?

A. Yes, sir.” (Tr. 407, 408)⁵

Ultimately, pretrial, the court declined to suppress the oral admissions, post-arrest and while in custody. At trial the DEA agents told the trial jury about petitioner's alleged post-arrest statements (O.Tr. 330-

⁵ The government report on the post-arrest statement is reproduced as an Exhibit to R. 7. There is no reference to this report to any request for counsel by Cruz.

Special Agent Peckos swore to a magistrate's complaint which contained the original charge against Cruz in this case [e.g., possessing with intent to distribute a quantity of heroin on December 16, 1976 in violation of 21 U.S.C. 841(a)(1)]. THIS MAGISTRATE'S COMPLAINT, FILED ON DECEMBER 17, 1976, MADE NO REFERENCE TO ANY POST-ARREST ADMISSION OR STATEMENT BY CRUZ, Tr. 464-465; R. 2 in original record.

332).⁶ The trial judge, over objection, charged the jury as follows:

“There has been testimony to the effect that the defendant made certain statements to the Drug Enforcement Agents on the evening of December 16 after his arrest. The defendant denies having made those statements. It is for you to determine whether he made those statements and if so, whether he made them voluntarily and understandingly. Unless you find that the defendant did make the statements and that he made them voluntarily and understandingly, you should not consider the alleged statements as evidence against him” (Tr. 388, 89).⁷

* * *

Pretrial, petitioner sought, *inter alia*, “standing” to contest the eavesdropping portions of the affidavit for the search warrant [in the affidavit the confidential informer is described as S B-26-0029]. The trial judge, pretrial, declined to grant petitioner standing but stated:

“I regard this as a substantial question and certainly not one which has been raised frivolously by the defense. It is one that is not without difficulty”. (Tr. 77)⁸

Likewise, the trial court, while declining to grant petitioner “access” to the Title III materials, stated:

⁶ Transcript of December 30, 1977.

⁷ Petitioner, both pretrial and while testifying on his own behalf, denied making any oral confession (O.Tr. 430-35; 440-43; 212-14).

⁸ December 19, 1977.

"I am the first to say that I could well be wrong, and I know that I will not be the final word on this matter." (Tr. 80)⁹

* * *

Pretrial, petitioner sought to impress the court with the fact that the affiant for the warrant committed the gross sin of offering material misrepresentations within the affidavit for the search warrant [alternatively, petitioner attempted to show that the affiant submitted knowing and reckless misrepresentations to the magistrate who issued the warrant during the evening hours of December 16, 1976]. For the purposes of our "Statement of the Case" we represent that the affidavit for the search warrant had material flaws as follows:

(a) That on December 16, 1976 in Chicago, Illinois, the affiant for the warrant, D.E.A. Agent Peckos, swore to a federal magistrate in Chicago that a defendant named Rafael Rivera went from 3561 West Belden, Chicago to 2514 West Haddon, Chicago, and back, during the afternoon hours of December 16, 1976;¹⁰

(b) That the events just described were watched not only by Peckos but, by several of his fellow D.E.A. agents;¹¹

(c) That the entire "saga" seemingly began on the morning of December 16, 1976 when Chicago D.E.A. was contacted by an eastern wing of D.E.A. and advised

⁹ December 19, 1977. Petitioner did not have the report (App. D, *infra*) until during the appellate process. We surmise that had the trial judge been advised that the government report showed that the confidential informant "was never installed" a different result might have flowed.

¹⁰ Peckos testimony . . . Tr. 87-106; 112-99; 282-297; 304-308.

¹¹ Agent Scheuler . . . Tr. 247-81; 308-336; Agent Hahner . . . Tr. 341-355.

that Rafael Rivera and Daisy Gonzales would be in Chicago on December 16 to purchase a kilo of heroin for \$28,000.00 and that there would be six (6) kilos of heroin available;¹²

(d) That Agent Anderson of the D.E.A. in Hartford, Conn., had learned that Daisy and Rafael were coming to Chicago on December 16 to purchase the kilo from a reliable informant and as it eventually turned out that reliable informant was a wiretap on the telephone of Rivera;

(e) That a Chicago D.E.A. Agent (Scheuler) was working with the affiant (Peckos) on December 16, 1976 and he had seen (during narcotic investigations) JOSE DeLEON and he so testified on July 27, 1977 before a federal magistrate in Chicago during a removal proceeding against Jose DeLeon;¹³

(f) That within the body of the affidavit for the warrant it is stated that Rivera went from Belden Street to Haddon Street and back to Belden Street (carrying a bag each time) and that thereafter Rivera left Chicago on the same afternoon bound for an airport in the Hartford area;

(g) In reality it was JOSE DeLEON who went from Belden to Haddon and back to Belden on the afternoon of December 16, 1976 and, further, affiant Peckos and fellow-agent Scheuler both *watched* Rivera, DeLeon and Gonzales standing together before Rivera and Gonzales took a cab to the airport (during the afternoon of December 16, 1976);

¹² Compare paras. #2 and #3 of Group App. C, *infra*. Agent Anderson is telling affiant-Peckos what he learned from the confidential informer . . . *really* the wiretap!

¹³ An Attorney, Michael Cody, testified that PRIOR TO DECEMBER 16, 1976, SCHEULER KNEW AND COULD RECOGNIZE DeLEON (O.Tr. 199-209; SCHEULER AGREES, O.Tr. 308-315).

(h) That Agent Peckos reviewed the various events with Agent Scheuler and others before getting a warrant and he (Peckos) was "in no hurry" because there was plenty of time;

(i) That even after the D.E.A. agents discovered that they had misidentified Rivera in the affidavit for the search warrant they did nothing to call this to the attention of any court or magistrate and, in fact, only verbally reported their "error" to the U.S. Attorney. Even further in a D.E.A. Report apparently authored on December 28, 1976 the D.E.A. declined to identify Jose DeLeon by name . . . rather, the D.E.A. referred to DeLeon as John Doe #1.

In addition to several agents being on surveillance all day on December 16, 1976 they were also armed with photo-equipment and they took approximately thirty (30) (or more) photos of the different persons acting out their roles (such as they were) on December 16, 1976 in Chicago.¹⁴ The ONLY TIME THAT PHOTOGRAPHS WERE NOT TAKEN WAS FOR THE SHORT PERIOD OF TIME WHEN THE MALE SUBJECT *MISIDENTIFIED AS RIVERA* WENT FROM BELDEN STREET TO HADDON STREET AND BACK TO BELDEN STREET, EACH TIME CARRYING A PAPER BAG.

At no time did the government contest the falsity of the affidavit. Rather, the government simply opted to explain that it was a natural mistake and that the agent who was the affiant had nothing to gain by misinforming the magistrate as to the identity of the person entering and leaving the Haddon Street premises during

¹⁴ R. 35, 36, 39. R. 39 reflects the defense memorandum supporting suppression; R. 35 reflects the government's position urging nonsuppression.

the afternoon hours of December 16, 1976. The transcripts demonstrate that the affiant for the warrant [Agent Peckos] and his fellow agents were well-versed in search and seizure law (O.Tr. 260-263) and they had been trained in surveillance and identification (O.Tr. 187-192; 308-314; 324-331; 260-263). In addition this was not a "hurry" situation where the agents were running about trying to get a warrant. Agent Peckos testified that he had an Assistant U.S. Attorney helping to prepare the warrant (O.Tr. 193) and, further, that there was "no hurry" (O.Tr. 288). It was and is the view of the petitioner that the DEA agents intentionally made Rafael Rivera the person entering and leaving the Haddon Street premises in order that they would have no problem with the federal magistrate insofar as the probable cause for the search warrant.

INTRODUCTION TO ARGUMENT

In *Nash v. Estelle*, 597 F.2d 513 (C.A. 5, 1979), (*en banc*), the Court declined to grant habeas relief to a state inmate where the sole question revolved around the right to counsel in a post-arrest-custody setting. In part, that decision, as may be applicable to this petition, states:

It is clear that any attempt by an interrogator to persuade the suspect to retract a previously voiced request for counsel would require exclusion of the evidence. See *U.S. v. Massey*, 550 F.2d 300, 308 (CA5, 1978) ("Once the privilege has been asserted . . . , an interrogator must not be permitted to seek its retraction, total or otherwise."), quoting *U.S. v. Crisp*, 435 F.2d 354, 357 (CA 7, 1970); *U.S. v. Clark*, 499 F.2d 802, 807 (CA4, 1974). Attempts by interrogators to persuade the suspect that he does not need an attorney present are nothing more than attempts to get the suspect to accept the untruth that the interrogators are "acting solely in [the suspect's] best interest." *Miranda*, 384 U.S. at 470, 86 S.Ct. 1625, 16 L.Ed.2d at 721. Such efforts were condemned in *Miranda* and clearly would render any purported waiver invalid. (597 F.2d at 524, *ft.nt. omitted*)

The touchstone of our position is that this Court must make consistent the post-arrest-custody-statement syndrome. In *Nash v. Estelle*, *ante*, the Court pointed out the confusion. The Court stated:

There is some dispute over the exact content of the government's heavy burden. Some have argued that the government's burden is less stringent in Fifth Amendment self-incrimination cases than in Sixth Amendment right to counsel cases, such as

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). See, e.g., *North Carolina v. Butler*, U.S., 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979) (Blackmun, J., concurring); *U.S. v. Brown*, 569 F.2d 236, 239 (CA5, 1978) (*en banc*) (Hill, J., concurring); *U.S. v. Satterfield*, 558 F.2d 655 (CA2, 1976). Whether the government's "heavy burden" is heavier in Sixth Amendment cases than in Fifth Amendment cases is an issue that need not be addressed on this appeal since under any burden of proof, even a preponderance of the evidence standard, the government is unlikely to prevail. (597 F.2d 530 at n.19)

The uncertainty of what is to happen when an accused requests counsel [as the petitioner at bar clearly did] is demonstrated by a later decision from the Fifth Circuit, *Thompson v. Wainwright*, 601 F.2d 768 (C.A.5, 1979). In *Thompson*, the Court decided that where *Thompson*, while in custody requested counsel at some point during interrogation [post-arrest-custody] . . . the later, post-arrest confession, could not have been used as evidence during his state homicide trial. Thus, the Court reversed the denial of habeas relief and a majority of the Court voted to grant the writ. The Court pointed out the confusion in evaluating a "per se" interrogation rule as follows:

In *Miranda*, the Supreme Court laid down what Justice White was later to call a "per se" rule in *Michigan v. Mosley*, 423 U.S. 96, 109, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (White, J., concurring):

If the individual [being interrogated] states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to

police, they must respect his decision to remain silent.

334 U.S. at 474, 86 S.Ct. at 1628. Nor can we ignore the Court's very recent decision in *Fare v. Michael C.*, U.S., 99 S.Ct. 2560, 60 L.Ed.2d (1979). There, in the course of deciding that a request for the presence of a probation officer rather than a lawyer did not trigger *Miranda's* rule, the Court quoted the above passage from its decision in that case and re-emphasized repeatedly the "rigid" and "*per se*" nature of the rule. Such references dot the opinion like raisins in a fruitcake. (601 F.2d 771, n.5)

The confusion within the Circuits is marked in *Nash v. Estelle*, ante, where the Court (597 F.2d at 527) cites no less than thirty-five (35) authorities showing conflicting decisions on whether or not there is a "*per se*" rule when an accused, while in custody, requests counsel. What happens after the request should be the subject of the "*per se*" rule . . . but as the conflicting decisions demonstrate there is no such consistency in this sacred "right to counsel" syndrome. This petition provides an appropriate vehicle for the evaluation and perfection of the "*per se*" rule . . . if the Court is to be true to the *Miranda* decision.

* * * * *

The petitioner urges that the search warrant [more properly the affidavit] is constitutionally defective in that there are material misstatements within the affidavit. To that end the petitioner urges an expansion of the doctrine announced by the Court in *Franks v. Delaware*, U.S., 98 S.Ct. 2674 (1978). In *Franks*, the Court ruled that:

. . . where the defendant makes a substantial preliminary showing that a false statement

knowingly and intentionally, [or with reckless disregard for the truth,] was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or [reckless disregard] is established by the defendant by a preponderance of the evidence, and, [with the affidavit's false material set to one side] the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. (98 S.Ct. at 2677)

Petitioner, in this case, has clearly shown that there were contained in the affidavit "false material" (compare *Franks* at 2677). Petitioner urged below that the "false material" if set to one side . . . would make the affidavit fall beneath the probable cause requirements for Fourth Amendment purposes. Both the trial court and the Court of Appeals disagree. However, neither court properly analyzed the entirety of the scenario. Trained DEA agents felt that the private premises in Chicago on December 16, 1976, had drugs within that house. They had absolutely no real information placing drugs within the house.¹⁵ Even more startling is the refusal to allow petitioner to attack portions of the affidavit (particularly

¹⁵ At approximately 2:00 p.m. Jose DeLeon and not Rafael Rivera entered those premises and left those premises within ten (10) minutes. DeLeon was carrying a bag. Some six (6) hours later Daisy Gonzales, while debarking a flight from Chicago to Boston, was arrested and a search revealed a similar bag containing heroin. There was absolutely no showing of any kind to demonstrate that there were any more drugs in the private premises searched by DEA at about 9:45 p.m. on December 16, 1976. Compare the affidavit for the search warrant reproduced at App. C, *infra*.

pars. #2 and #3) based upon the fact that the court below found that petitioner was without "standing" to say that the confidential informant . . . who, in reality, was an alleged court authorized wiretap was either unreliable or non-existent. Reality, being what it is, we have appended to this petition the Report of the Administrative Office of THE UNITED STATES COURTS. That Report shows that the confidential informant could not have been one . . . because it was never installed (App. D, *infra*). In *Massachusetts v. White*, 436 U.S. . . ., 99 S.Ct. 712 (1978), this Court affirmed the decision of the Massachusetts Supreme Court holding that probable cause for the issuance of the search warrant may not be established by using statements which were taken in violation of *Miranda* (compare 371 N.E.2d 777 (1977)).¹⁶ In juxtaposition petitioner shows this Court an affidavit for a search warrant with contains not only material misstatements but which relies on information from a confidential informer [a court authorized wiretap] where petitioner demonstrates that the confidential informer doesn't exist [U.S. Court Report, App. D, *infra*]. What realistic impediment can there be to estop *the law* from giving the petitioner the right to contest the falsity of the underlying affidavit which was used to seize the evidence in this case. Petitioner claims that there is no such impediment. In *U.S. v. Salvucci*, 599 F.2d 1094 (C.A. 1, 1979), the Court affirmed the suppression of items seized pursuant to the service and execution of a search warrant. The items seized were not within either the possession or control of the defendants. On the question of standing the court found for the defendants but stated:

¹⁶ The decision of the Massachusetts Supreme Court reversing the conviction was affirmed by this Court, 99 S.Ct. at 712 (1978).

Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. *That is an issue which the Supreme Court must resolve.* (599 F.2d at 1098)¹⁷

The decision in *Salvucci* also points up the split in circuits on the "automatic standing doctrine". The court points out that the First and Second Circuits along with the Ninth Circuit seem to hold that the "automatic standing doctrine" survives while the Sixth Circuit holds to the contrary. The Third Circuit in *U.S. v. Genser*, 582 F.2d 292 (C.A.3, 1978), extended the "standing doctrine" to allow a convicted taxpayer to contest, post-conviction, the right of the IRS to summon and seize the taxpayer's bank records from third persons, but see *Genser v. U.S.*, Cert. Petition #79-249. Resolution of the standing question is essential to the proper administration of criminal justice in the federal courts.

¹⁷ In *Salvucci* that court questioned this court's "standing doctrine" citing *Alderman v. U.S.*, 394 U.S. 165 (1969), *Brown v. U.S.*, 411 U.S. 223 (1973), *Jones v. U.S.*, 362 U.S. 257 (1960), *Simmons v. U.S.* 390 U.S. 377 (1968), *Rakas v. Illinois*, . . . U.S. . . ., 99 S.Ct. 421 (1978), *Salvucci*, 599 F.2d at 1097-98 (1979).

REASONS FOR GRANTING THE WRIT

Questions 1, 1A and 1B Consolidated

1. The proceedings below make clear that the petitioner sought counsel post-arrest, and while in custody (O.Tr. 401, 407-8). It is equally clear that without counsel he was interrogated (O.Tr. 415).

In *U.S. v. Priest*, 409 F.2d 491 (C.A.5, 1969), the Court set aside an auto theft conviction [18 U.S.C. § 641] where the question on appeal ran to the admission of an oral post-arrest statement to an FBI agent after *Priest* did not want to sign a waiver form until he consulted with an attorney (*id.* at 492). The request being ignored, the interrogation proceeded and the confession was obtained . . . almost exactly as in the instant case. While reversing the court stated:

Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible. (409 F.2d at 493)

In *Government of Canal Zone v. Gomez*, 566 F.2d 1289 (C.A.5, 1978) the court affirmed the suppression of a confession after the defendant, at some point during the *Miranda* warnings, requested counsel (1290). The court, while affirming, set out:

"If the [accused] states that he wants an attorney, the interrogation must cease until an attorney is present", *Miranda* at 384 U.S. 436, 474, 86 S.Ct. 1602 at 1628 (1966).

In *North Carolina v. Butler*, U.S., 99 S.Ct. 1755 (1979), this Court determined that the Supreme Court of North Carolina erred in granting relief for *Miranda*

violations where that respondent did not affirmatively request counsel. In *Butler* the majority stated:

"At no time did the respondent request counsel or attempt to terminate the agent's questioning". (99 S.Ct. at 1756)

The situation with our petitioner is the opposite of *Butler*.¹⁸ The government agents testifying during the pretrial suppression hearings clearly articulated petitioner's request for counsel.¹⁹ Further, in *Butler*, the majority pointed out that *Butler* offered no evidence at the suppression hearing tending to controvert the government agent's statements regarding "right to the assistance of counsel" (99 S.Ct. at 1756).

During the same term the court decided *Fare v. Michael*, U.S., 99 S.Ct. 2560 (1979). In *Fare*, the Court re-emphasized the *Miranda* rule. The court pointed out:

. . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 473-474, 86 S.Ct., at 1627, 1628 (footnote omitted). (99 S.Ct. at 2568)

While this court in *Fare* cast the question in Fifth Amendment terms (99 S.Ct. at 2569) and ultimately

¹⁸ Justices Stevens and Marshall joined Justice Brennan dissenting, 99 S.Ct. 1759-1760.

¹⁹ Of course, the agent spoke of the request for counsel in terms of refusing to execute the "waiver form" (O.Tr. 401-08). Petitioner testified, both pretrial and at trial, and denied even making the oral admissions (O.Tr. 424-443; 212-214). Thus, petitioner's case clearly departs from *Butler*.

decided that for the purposes of both *Miranda* and the Fifth Amendment the request for a probation officer was not the same as for counsel (99 S.Ct. at 2569-2570) this court did explain the role of counsel:

We thus believe it clear that the probation officer is not in a position to offer the type of legal assistance necessary to protect the Fifth Amendment rights of an accused undergoing custodial interrogation that a lawyer can offer. The Court in *Miranda* recognized that "the attorney plays a vital role in the administration of criminal justice under our Constitution." 384 U.S., at 481, 86 S.Ct., at 1631. It is this pivotal role of legal counsel that justifies the *per se* rule established in *Miranda*, and that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend. A probation officer simply is not necessary, in the way an attorney is, for the protection of the legal rights of the accused, juvenile or adult. (99 S.Ct. at 2570)²⁰

It is clear that the petitioner sought an attorney . . . not a probation officer. The decision below is not only incorrect but it conflicts with similar decisions from other circuits. In *U.S. v. Hernandez*, 574 F.2d 1362 (C.A. 5, 1978), the court set aside a series of federal drug convictions solely on the issue of the admission of the defendant's custodial-post-arrest statements. A pretrial hearing, resulting in conflicting testimony showed that Hernandez, post-arrest, sought counsel prior to the making of any statements (574 F.2d at 1366-67). The trial court ruled the admissions admissible and Hernandez was convicted. On appeal, the court reversed the conviction on

²⁰ *Michigan v. Mosley*, 423 U.S. 96 (1975), addressed the question of custodial statements vs. the right to remain silent, 423 U.S. at 103. Justices Brennan and Stevens joined Justice Marshall dissenting in *Fare*. Justice Powell separately dissented in *Fare* (99 S.Ct. at 2575-2577).

both Fifth and Sixth Amendment grounds. In pertinent part, the *Hernandez* court stated:

Finally, we are confronted with the District Court's failure to expressly resolve the conflicting evidence and make a clear ruling on Hernandez's assertion that he had simultaneously requested counsel each time he exerted his right to remain silent. In view of the District Court's implicit finding that Hernandez did not request counsel, a finding which the evidence reasonably supports, we do not consider appellant's Fifth Amendment right to counsel claim. We emphasize, however, that if it had been determined that Hernandez indeed requested counsel simultaneously with the invocation of his right to remain silent, we would be faced with an even more egregious situation. Denial by authorities of an express desire for counsel is a serious matter which affects fundamental constitutional rights of the accused, and such a denial most certainly cannot make continued interrogation more honorable or less suspect. In any case, the facts as found by the District Court unequivocally demonstrate that Hernandez's *Miranda* right to cut off questioning was not scrupulously honored. (574 F.2d at 1370; ft.nt. omitted)

Within the parameters of this case footnote commentary becomes important. In *Hernandez*, while addressing the right to counsel, the court uttered the following:

"Although this Circuit generally has set high standards in waiver cases, it is unclear whether a suspect may waive his once invoked right to counsel" (574 F.2d 1370, n.16).

In *U.S. v. Christian*, 571 F.2d 64 (C.A. 1, 1978), the court reversed an interstate theft conviction finding that where Christian told the FBI agent he would talk to him "however, I would like to talk to an attorney first" the Fifth Amendment privilege against self-incrimination under *Miranda* clearly precluded the oral ad-

missions that came after the defendant's "request for counsel." The *Christian* court reasoned:

On the circumstances of this case, we cannot find that there was a voluntary, knowing, intelligent waiver. Rather, we find quite the opposite, an express refusal to waive. Appellant specifically refused to sign the waiver on the form presented to him by the FBI. Placing his signature above the waiver was a clear indication that he understood his rights and was choosing to stand on them rather than waive them. At that moment the interrogation should have stopped. No more questions about the case should have been asked until an express waiver was secured. Therefore appellant's statement should not have been admitted at trial. (571 F.2d at 69; ft.nt. omitted)

In *Brewer v. Williams*, 430 U.S. 387 (1977), the Court affirmed the Court of Appeals decision which had affirmed the granting of habeas relief on the question of right to counsel during post-arrest custody-interrogation. This Court, while affirming the granting of habeas relief, noted . . . that Williams [the respondent] was not denied Fifth Amendment protections but, rather:

"Williams was deprived of a different constitutional right—the right to the assistance of counsel" (430 U.S. at 398).

The *Brewer* decision quoted from the Court's decision in *Michigan v. Mosley*, [regarding the right to counsel] as follows:

[T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not com-

petent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." (*Brewer*, 97 S.Ct. at 1243, N. 10, quoting from *Mosley*, 423 U.S. at 110, N. 2).

Justice Marshall, concurring, in *Brewer* put the Sixth Amendment claim as follows:

"It will be because Detective Leaming, knowing full well that he risked reversal of Williams' conviction, *intentionally denied Williams the right of every American under the Sixth Amendment to have the protective shield of a lawyer between himself and the awesome power of the State*" (430 U.S. at 408-9; emphasis ours)

In light of the exceptional importance of the right to counsel question it is respectfully urged that certiorari be granted to resolve whether or not there is a "per se" rule under *Miranda* as interpreted by the Court of Appeals for the First Circuit in *Christian*, *ante*, and the Court of Appeals for the Fifth Circuit in *Priest*, *ante*, as opposed to the "waiver" rule announced by the Seventh Circuit in petitioner's case.

* * * * *

2. This Court has not passed on the question of what instruction, if any, is appropriate under the pronouncement of 18 U.S.C. § 3501.

The various factors which may guide a trial judge on the admission or exclusion of a post-arrest statement are enumerated in § 3501. The statute is *silent* as to what instruction, if any, the court is obligated to give to a trial jury in evaluating the alleged oral post-arrest statement.

Petitioner offered a standard Devitt and Blackmar instruction which the court refused (O.Tr. 247-248). That

instruction was #11.16.²¹ In the petition at bar the importance of a proper instruction is beyond question. The DEA agents, searching the private premises on December 16, 1976, found hidden in the basement a quantity of heroin. There were no witnesses to anything that petitioner allegedly did with this heroin. No scientific evidence [e.g., fingerprints, *et seq.*] tied petitioner to this heroin. Other adults were present when the premises were searched and the premises were owned, in joint tenancy, as between petitioner and his estranged spouse, Maria.²² The government produced no "independent" evidence of petitioner's possession of the drugs . . . save for the controverted post-arrest oral statement. Under such circumstances the Court's decision in *Schneble v. Florida*, 405 U.S. 27 (1972), provides some guidance. Justice Rehnquist summarized the framework for confession-harmless error by stating:

"The jurors could on no rational hypothesis have found *Schneble* guilty without reliance on his confession" (405 U.S. at 431-2).

So it is in the case at bar. The instruction [over objection] as given the trial jury was as follows:

"There has been testimony to the effect that the defendant made certain statements to the Drug Enforcement Agents on the evening of December 16 after his arrest. The defendant denies having made those statements. It is for you to determine whether he made those statements and if so, whether he made them voluntarily and understandingly. Unless you find that the defendant did make the statements and that he made them voluntarily and understandingly, you should not consider the alleg-

²¹ R. 53, Original record reproduced as Appendix E, *infra*.

²² Both petitioner and his estranged spouse were trial witnesses. They testified that petitioner had not lived in the home for several months preceding the search (O.Tr. 204-6; 303).

ed statements as evidence against him" (Tr. 388-89).

That instruction was woefully inadequate. The instruction, as given, offered the jury no guidance as to which party had the burden of proving, and by what quantum of evidence [by what standard] that the post-arrest oral admissions were in fact made, and if they were, were they made knowingly, intelligently and voluntarily. Petitioner denied both pretrial and before the jury that he made the admissions at all (O.Tr. 212-214, 424-443) The Circuits are hardly in accord.²³ In *U.S. v. Holbert*, 578 F.2d 128 (C.A. 5, 1978), the Court affirmed an interstate theft conviction where the issue presented on appeal was the nature and extent of a jury confession instruction. While affirming the Court approved an instruction:

Accordingly, he instructed them that such statements should be considered with caution and weighed with great care and disregarded entirely *unless the evidence establishes beyond a reasonable doubt that the statement was knowingly made.* (578 F.2d at 129; emphasis ours)

It is abundantly clear that the trial judge in the case at bar gave the jury no guidance as to whether the proponent of the oral admission had to prove, by any quantum of evidence, that:

²³ Jury to disregard entirely unless convinced beyond a reasonable doubt that statements or acts were voluntarily and intentionally made: *Coyote v. United States*, 380 F.2d 305, 309 (10th Cir. 1967, cert. denied 389 U.S. 992, 88 S.Ct. 489, 19 L.Ed.2d 484; *Clifton v. United States*, 125 U.S.App.D.C. 257, 371 F.2d 354 (1966), cert. denied 386 U.S. 995, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967); *United States v. Inman*, 352 F.2d 954, 956 (4th Cir. 1965). But cf. *United States v. Moriarty*, 375 F.2d 901, 905 (5th Cir. 1967), cert. denied 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350. Contra, *United States v. Doyle*, 373 F.2d 875, 879-880 (2d Cir. 1967).

(a) That the admission [controverted] was knowingly and voluntarily made;

(b) By either beyond a reasonable doubt or by a preponderance of the evidence;²⁴

(c) And, further, there is no cautionary language alerting the jury to be skeptical about such oral admissions when they are post-arrest while the petitioner is in custody and after a request for counsel.

The later edition of Devitt and Blackmar (Third Ed., 1977) preface the jury instruction [approved] as follows:
§ 15.06

Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of court, and after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

In the instant case the Court of Appeals incorrectly summarized petitioner's argument as follows:

At trial Cruz denied being informed of his rights at any time, and denied admitting ownership of the heroin. Faced with two totally conflicting versions of the events surrounding the alleged confession, the court resolved the issues of fact concerning the voluntariness of the confession against appellant, and found that appellant was not denied access to an attorney. The district court correctly denied

²⁴ In *Lego v. Twomey*, 404 U.S. 477 (1972), the court found that at least a preponderance of evidence was necessary prior to admitting the confession (404 U.S. at 484-87). Justices Douglas and Marshall joined Justice Brennan dissenting (404 U.S. at 491-95). The thrust of the dissent was that *proof beyond a reasonable doubt* was necessary for the admission of the post-arrest statement. Neither Justice Powell nor Justice Rehnquist considered the decision in *Lego* (404 U.S. at 490).

appellant's motion to suppress, and properly submitted the issue of the voluntariness of the statement to the jury. (Slip Op. 4)

This Court has provided no particular guidance as to the proper and appropriate jury instruction(s). As we point out (N.23) the several courts considering the question have split on whether the jury should be charged that the government must prove beyond a reasonable doubt, that the post-arrest statement was actually made. Further, the courts dispute whether any instruction at all must be given in accordance with the mandate of 18 U.S.C. § 3501. A striking example of the confusion within the circuits is illuminated by *U.S. v. Barry*, 518 F.2d 342 (C.A. 2, 1975). In *Barry*, the Court reversed a similar federal drug conviction where the trial court gave only the following instruction in a case involving post-arrest admissions:

Of course, it is not only your task and your duty, but it is your exclusive province to determine what the facts in the case are and, in making that determination, to consider and weigh the evidence. (518 F.2d at 347)

Barry traces the history of 18 U.S.C. § 3501 (518 F.2d 345-47) but declined to set out an appropriate instruction . . . even though reversing on the failure to give *some instruction* as mandated by 18 U.S.C. § 3501(a). Thus, we point out, respectfully, that the exceptional importance of this issue makes the question appropriate for this court's review. The government will concede that in petitioner's case *absent* the controverted statements(s) . . . petitioner's trial would have been so close so that a judgment of acquittal at the close of the government's case would not have been an unlikely result.

* * *

Questions 3, 3A and 3B Consolidated

3. Whether the misstatements in the affidavit for the search warrant were of sufficient moment to compel suppression.

In *Franks v. Delaware*, 438 U.S., 98 S.Ct. 2674 (1978), this Court directed that suppression be the answer if . . . setting aside the challenged paragraphs of the affidavit . . . the remaining content is insufficient to establish probable cause (98 S.Ct. at 2677). Petitioner has demonstrated that paras #2 and #3 in this case (Group Appendix C, *infra*) are *seemingly* false in that the confidential informer therein described was according to official government reports . . . not a confidential informant at all . . . but a non-installed electronic eavesdropping telephone tap (App. D, *infra*). Further, paras #8 and #9 of the same affidavit are, by concession, false in that the individual entering and leaving the Haddon Street premises was *not* Rafael Rivera but, rather, was Jose DeLeon. Even further the trained DEA agents saw Rivera and DeLeon standing together, in the daylight, during the afternoon of December 16, 1976. Still further the agents were in no "hurry" to prepare the affidavit for the warrant and they had the assistance of a United States Attorney in preparing same.²⁵ At worst the affidavit contained perjury. At best, the affiant's statements to the federal magistrate on December 16, 1976, were reckless half-truths. We urge the Court to invoke *Franks* in this federal case. In *U.S. v. Esparza*, 546 F.2d 841 (C.A. 9, 1976), the Court reversed a federal drug conviction finding an affidavit for a search warrant insufficient. Speaking to the constitutional question, that Court stated:

²⁵ Our Statement of the Case, *ante*, delineates transcriptual and record references as to the above representations.

"Nevertheless, an affidavit must present to the magistrate sufficient facts to allow him independently to determine whether probable cause to arrest exists. The protection of the *Fourth Amendment* lies in requiring that this inquiry be made "by a neutral and detached magistrate instead of . . . by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). Thus, the affidavit must inform the magistrate of all the essential facts with sufficient clarity to enable him to exercise his independent judgment. *United States v. Anderson*, 453 F.2d 174 (9th Cir., 1971). *Half-truths and misrepresentations* as well as conclusory allegations can reduce the function of a magistrate to that of a rubber stamp upon the law enforcement officer's personal determination of probable cause. Cf., *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958)." (546 F.2d at 843, 844)

In *U.S. v. Carmichael*, 489 F.2d 983 (C.A. 7, 1973) (en banc), the Court variously mandated suppression when:

"However, we conclude that if deliberate government perjury should ever be shown, the Court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing" (489 F.2d at 989).²⁶

Petitioner suggests that excising paragraphs 2-3 and 8-9 of the instant affidavit . . . in accordance with *Franks* leaves an insufficient Fourth Amendment "probable cause" basis for the warrant.²⁷

²⁶ *Carmichael* was cited with approval in *Franks v. Delaware*, 98 S.Ct. at 2678, n. 4.

²⁷ If a challenged affidavit is insufficient because it incorporated a flawed confession . . . then how can an affidavit
(Footnote continued on following page)

We further suggest that taking the affidavit as it stands there is still insufficient probable cause. In *U.S. v. Rasor*, 599 F.2d 1330 (C.A. 5, 1979), the Court set aside a federal drug conviction where the affidavit was in part based on an informer's tip but where . . .

"the information must raise more than a reasonable suspicion in the magistrate's mind" (599 F.2d at 1332).

There is not a shred of independent evidence or information which could lead to the "probable cause" that there were drugs in the private premises searched. No one said there was "more drugs" in that home after Jose DeLeon [and not Rafael Rivera] left that home during the afternoon hours of December 16, 1976. Under such circumstances we ask this court to be alert to the type of abuses that are visited on the "affidavit-system" by over-zealous agents. This is such a case.

2A. The court below found that petitioner was not an "aggrieved person".

Thus "standing" was denied under 18 U.S.C. § 2510 (11) (Slip Op. 3, n.1). However, under Rule 41(e) of the Fed.R.Crim.Proc., . . . petitioner was and is a "person aggrieved" by virtue of the definitions contained in Rule 41(e).²⁸ It borders on metaphysical to believe that constitutional law can proscribe "standing" to an *aggrieved person* but *GRANT STANDING TO A PERSON AGGRIEVED*. A distinction absent a difference. Petitioner is a citizen subjected to the vice of an arguably improper search under both the Fourth Amendment

²⁷ continued

survive this court's scrutiny where the "confidential informant" is a non-installed wiretap . . . *Massachusetts v. White*, U.S., 99 S.Ct. 712 (1978).

²⁸ As announced by this Court in *Jones v. U.S.*, 362 U.S. 257, at 261-62 (1960).

and Rule 41(e), Fed.R.Crim.Proc. Neither the trial court nor the Court of Appeals challenged petitioner's "standing" to contest the legality of the affidavit on Fourth Amendment grounds. Yet, in a totally inconsistent manner, both courts said that petitioner was not an "aggrieved person". The trial court recognizing the dilemma . . . on the question of standing stated:

"I regard this as a substantial question and certainly not one which has been raised frivolously by the defense. It is one that is not without difficulty". (Tr. 77)

The trial court, while denying petitioner "access" to the "Title III materials" [after denying petitioner standing to attack paras #2 and #3 of the affidavit sensitively stated:

"I am the first to say that I could well be wrong, and I know that I will not be the final word on this matter." (Tr. 80)

Presumptively where the statute denies standing unless the attacking party is "an aggrieved person" but the rule grants standing to a "person aggrieved" . . . then the rule and not the statute applies.²⁹

In *U.S. v. Salvucci*, 599 F.2d 1094 (C.A. 1, 1979), the Court affirmed the suppression of Articles seized pursuant to the execution of a search warrant. The Court held that the affidavit failed to state sufficient probable cause for the issuance of the warrant. However, the Court went further and declared that both defendants in that case had "standing" to seek suppression even though the articles seized were in an apartment where at least one of the defendants had no nexus. In *Salvucci*, the Court granted both defendants standing to object as follows:

In *Jones*, the Supreme Court held that a defendant has automatic standing to challenge the legality of a

²⁹ Rule 41 v. 18 U.S.C. § 2510(11).

search or seizure if charged with a crime that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. The Court offered a twofold rationale in support of this rule: (1) the unfairness of requiring the defendant to assert a proprietary or possessory interest in the premises searched or the items seized when his statements could later be used at trial to prove a crime of possession; and (2) the vice of prosecutorial self-contradiction, that is, allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. *Id.* at 261-65, 80 S.Ct. 725; *Brown v. United States*, *supra* 411 U.S. at 229, 93 S.Ct. 1565. (599 F.2d at 1097)

The *Salvucci* Court attempted to delineate the "standing dilemma" but declined to offer total resolution. Rather, the Court while recognizing both the dilemma and the split of authority left the questions of standing to the further resolution of this court as follows:

The Supreme Court itself has questioned, but unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vitality of the doctrine of automatic standing. See *Rakas v. Illinois*, *supra* U.S. at, n.4, 99 S.Ct. 421; *Brown v. United States*, *supra*, 411 U.S. at 228, 229, 93 S.Ct. 1565. Since the Supreme Court first questioned the vitality of this doctrine in *Brown*, there has been a split of authority as to whether the doctrine survives. Compare *United States v. Riquelmy*, 572 F.2d 947, 950-51 (2d Cir. 1978), and *United States v. Boston*, 510 F.2d 35, 37-38 (9th Cir. 1974), *cert. denied*, 421 U.S. 990, 95 S.Ct. 1994, 44 L.Ed.2d 480 (1975) (doctrine survives) with *United States v. Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976) (doctrine does not survive). Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled

by *Simmons*. That is an issue which the Supreme Court must resolve. (599 F.2d at 1097-98, emphasis ours)

In *U.S. v. Mazzelli*, 595 F.2d 1157 (C.A. 9, 1979), the Court affirmed suppression of drugs found in a suitcase where the singular question presented related to the standing of the non-possessory defendant to seek suppression of the drugs found in that suitcase. The majority of the *Mazzelli* Court held that the non-possessory defendant had standing and affirmed the suppression stating:

The Supreme Court's latest discussion of standing to suppress the fruits of an unlawful search and seizure is found in *Rakas v. Illinois*, U.S., 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). That case reexamined the second portion of *Jones* dealing with standing based on an interest in the premises searched and the standards that should apply in such cases. However, in substance it reaffirmed the proposition recognized in *Jones* that a possessory interest in that which was seized confers standing.

The court first emphasizes the failure of the petitioner to assert a claim of ownership over the items seized U.S. at, n.1, 99 S.Ct. 421. To us this implicitly recognizes that a possessory interest in the evidence seized confers standing to challenge the seizure. This implicit recognition is later explicitly noted. After suggesting that a "casual visitor" should not be able to contest the lawfulness of a search, the Court states: "This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." *id.* at, 99 S.Ct. at 430. (595 F.2d at 1160)³⁰

³⁰ Judge Bonsal, dissenting in *Mazzelli*, urged that, in combination, *Alderman v. U.S.*, 394 U.S. 165 (1969) and *Rakas v. Illinois*, *ante*, must be interpreted to deny standing to the non-possessory defendant.

Within the parameters of this question (consolidated Question 3) we have hopefully demonstrated the exceptional importance of this argument. It is inconsistent, if not impossible, to believe that this court has ever intended that a person charged with a possessory offense cannot be an "aggrieved person" for the purpose of allowing that defendant to attack a search warrant/affidavit which has not only material misrepresentations but, also, reference to a confidential informant . . . that happens to be an electronic eavesdropping device(s) which the report from the United States Court Commission finds was never installed.

CONCLUSION

In light of the exceptional importance of each of the questions presented within this petition it is respectfully prayed that this petition for writ of certiorari be granted and that this court reverse the conviction and sentence and remand this case for a new trial or, indictment dismissal under this Court's supervisory powers, 28 U.S.C. § 2106.

Respectfully submitted,

ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863

*Attorney for Petitioner,
Herminio Cruz.*

APPENDICES

GROUP APPENDIX A—Decision below, *U.S. v. Cruz*,
..... F.2d (C.A. 7, 1979).

APPENDIX B—Order denying rehearing dated October 2, 1979.

GROUP APPENDIX C—Search warrant and affidavit used by the D.E.A. to search private premises in Chicago at about 9:45 p.m. on December 16, 1976.

GROUP APPENDIX D—REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications. This report shows that the wiretap was "NI" meaning "never installed".

APPENDIX E—R. 53 original record.

GROUP APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 78-1257, 78-2178

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERMINIO CRUZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76-CR 1285-1—**John F. Grady, Judge.**

ARGUED APRIL 5, 1979—DECIDED AUGUST 17, 1979

Before PELL and BAUER, *Circuit Judges*, and HOFFMAN,* *Senior District Judge*.

PER CURIAM. Appellant Herminio Cruz was charged in a single-count indictment with possession with intent to distribute approximately nine pounds of a mixture containing heroin, in violation of Title 21, United States Code, § 841(a)(1). The jury returned a verdict of guilty. Cruz was fined \$25,000 and sentenced to fifteen years in the custody of the Attorney General of the United States.

* The Honorable Walter E. Hoffman, Senior United States District Judge, Eastern District of Virginia, sitting by designation.

The seizure of the heroin resulted from the execution of a warrant directing the search of a residence owned by Cruz. Evidence introduced at trial indicated that Cruz's estranged wife and their children lived in the building, and that Cruz occupied a first floor bedroom in which he kept clothing and other personal effects. During the search a brown paper bag containing \$29,000 in cash was found on the bed in the first floor bedroom. A small scale and a coffee grinder which contained traces of heroin were found in the kitchen. The heroin was discovered hidden in the hollow portions of a cinder block wall in the basement. Cruz was present at the time of the search. After being arrested and transported to the headquarters of the Drug Enforcement Agency, Cruz allegedly admitted that the heroin found in the basement was his, and further stated that he had obtained the heroin from a Mexican male known variously as "Chencho" and "El Colorado". At trial Cruz denied admitting that the heroin was his and contended that he was not informed of his rights after his arrest. DEA agents testified that Cruz was informed of his rights during his transportation to headquarters, and also during the processing of his arrest prior to questioning by the agents.

Following his conviction Cruz filed several post-trial motions, alleging that the deputy marshal in charge of the jury during its deliberations had made improper comments to the jurors concerning the jury instructions, and alleging that the heroin introduced into evidence at trial was taken into the jury room in violation of the court's order. Three jurors selected at random and the deputy marshal were deposed concerning these allegations. The court subsequently denied appellant's motions for relief.

Appellant raises five areas in which it is alleged that error occurred during trial: (1) the denial of appellant's motion to quash the search warrant; (2) the admission of appellant's alleged confession into evidence; (3) the nature of the reasonable doubt instruction to the jury; (4) the nature of the prosecutor's closing argument; and (5) the denial of the post-trial motions. We find

appellant's contentions to be without merit, and accordingly affirm the conviction.

The search warrant executed on appellant's residence was issued in reliance on the affidavit of one of the agents involved in the investigation. The affidavit thoroughly detailed the progress of the overall conspiracy investigation, which began on the east coast, moved to Chicago, and culminated in an arrest in the Hartford, Connecticut airport and the recovery of a kilogram of heroin. That portion of the affidavit material to establishing probable cause to search the Cruz residence misidentified the individual who drove to the residence to pick up the heroin which was later recovered in Hartford. That mistake in identity was understandable under the circumstances and was not material to the determination of probable cause. The facts do not support the appellant's contention that the misstatement in the affidavit was reckless or intentionally untruthful. The district court properly denied appellant's motion to quash the search warrant.¹

At the time appellant was processed following his arrest he refused to sign a printed form waiving his right to remain silent and his right to counsel. In effect he argues that this renders any communication made by him at that time an involuntary communication. Most recently the Supreme Court has held that, while an express written or oral statement of waiver is usually strong proof of the validity of that waiver, it is not inevitably either necessary or sufficient to establish waiver. *North Carolina v. Butler*, U.S., 47 L.W. 4454, 4455 (April 24, 1979). Thus, a refusal to sign a waiver form is a relevant factor in determining whether an individual knowingly and intelligently waived his privilege, but it is not a controlling one. *United States v. Gardner*, 516 F.2d 334, 341 (7th Cir. 1975). Prior to questioning Cruz a government agent purportedly in-

¹ A wiretap involved in the investigation on the east coast was totally immaterial to the search of Cruz's residence. Furthermore, Cruz was not a party to an intercepted conversation or a person against whom the interception was directed, as defined in Title 18 U.S.C. § 2510(11).

formed him of his rights in Spanish, asked him if he understood his rights, and handed him the waiver form. Cruz refused to sign the waiver unless his lawyer was present. Thereupon the agents advised him that they would like to ask him some questions, that he was entitled to have his lawyer present, that he did not have to answer any questions unless his lawyer was present, and that he could stop the questioning at any time for the purpose of consulting with an attorney.² At that time Cruz was asked about the heroin found in his home, and, according to the agents' testimony, admitted it was his. At trial Cruz denied being informed of his rights at any time, and denied admitting ownership of the heroin. Faced with two totally conflicting versions of the events surrounding the alleged confession, the court resolved the issues of fact concerning the voluntariness of the confession against appellant, and found that appellant was not denied access to an attorney. The district court correctly denied appellant's motion to suppress, and properly submitted the issue of the voluntariness of the statement to the jury.

This circuit has described the giving of a reasonable doubt instruction as "playing with fire," and has expressed strong reservations about whether such instruction should be given at all in light of the difficulty in defining reasonable doubt. *United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975). Be that as it may, the instruction given by the court in the case at bar was without error. The instruction essentially defined reasonable doubt as "a doubt founded on reason," a doubt that is not "purely speculative." The court properly refused to add a "two hypotheses" instruction, since such an instruction is usually reserved for a case bottomed on purely circumstantial evidence. *United States v. Shaffner*, *supra*.

² In *North Carolina v. Butler*, *supra*, the respondent, who possessed an eleventh grade education, was handed an "Advice of Rights" form which he read and refused to sign. He was told that he need neither speak nor sign the form, but that the agents would like him to talk to them. The respondent replied that he would talk but would not sign any form. He then proceeded to make inculpatory statements.

Appellant contends that the government offered a series of facts not in evidence in that part of its closing argument which focused on appellant's alleged construction and control of the cache where the heroin was discovered. There were at least some facts in evidence which would provide a basis for the government's argument. The appellant made no objection to these statements either during or after the argument. The statements do not provide grounds for reversal.

Finally, it is urged that the court erred when it denied appellant's motions for a new trial. It is alleged that the deputy marshal delivered the instructions to the jury, pointed to the instruction which listed the elements of the crime charged, and stated words to the effect that "here is the main thing you are to consider that the judge just read to you." The only evidence to support this allegation is a statement purportedly made by the foreman of the jury in a telephone conversation with the United States attorney, a statement which the foreman could not remember making when he was deposed two months later.³ After reviewing the evidence the district court held that it was highly unlikely that the deputy marshal made the alleged statement to the jury. The appellant also alleged that the heroin introduced into evidence at trial was improperly taken into the jury room when the jury retired to deliberate. The only evidence to support this allegation was testimony of the deputy marshal and one of the jurors. The DEA agent in charge of the heroin exhibit testified categorically that the heroin was in his custody at all times and that it was not taken into the jury room.⁴ Assuming *arguendo* that the heroin was taken into the jury room, the court held that there could have been no possible prejudice to the appellant. The fact that a given quantity of heroin was

³ Two other jurors who were deposed had no recollection of the deputy marshal making this statement, and the deputy marshal denied making the statement.

⁴ The foreman of the jury and the other juror who was deposed had no recollection of the heroin being in the jury room. The court made a finding of fact that the heroin exhibit was never taken into the jury room.

seized from appellant's residence was never in issue in this case, and there were no prejudicial markings on the exhibits themselves. We find that the district court properly denied appellant's post-trial motions.

The conviction of the appellant is affirmed.⁵

AFFIRMED

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

⁵ We were told in argument that Cruz was also tried in the District of Massachusetts on a conspiracy to distribute heroin in violation of 21 U.S.C. § 846. In pretrial proceedings in Massachusetts, Cruz raised the double jeopardy question by reason of his being convicted "in another district" [Northern District of Illinois] of possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1) on the basis of the same conduct underlying the indictment in Massachusetts. In *United States of America v. Herminio Cruz*, 586 F.2d 781 (1 Cir. 1978), the court affirmed the action of the District Court in denying the motion to dismiss on double jeopardy grounds. Cruz was represented in the United States Court of Appeals for the First Circuit by the same counsel appearing before us. We agree with the conclusions reached by the First Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 2, 1979.

Before

Hon. Wilbur F. Pell, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. Walter E. Hoffman, Senior District Judge*

United States Of America,

Plaintiff-Appellee,

Nos. 78-1257, 78-2178 vs.

Herminio Cruz,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 76-CR-1285-7—John F. Grady, *Judge*.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Herminio Cruz, defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, Denied.

GROUP APPENDIX C

UNITED STATES DISTRICT COURT

For The
Northern District of Illinois, Eastern Division

Magistrate's Docket No.

Case No. 76M247

United States of America

vs.

Single family dwelling, 2514 West Haddon
Avenue, Chicago, Illinois
(see below for description).

AFFIDAVIT FOR SEARCH WARRANT

Before James T. Balog, 219 South Dearborn Street, Chi-
cago, Illinois.

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) the two story residence with basement, the seventh building west of Campbell Avenue, on the north side of Haddon Avenue, facing in a southerly direction, which building is covered with brown and yellow simulated brick siding, having three red awnings with blue trim on the front thereof, said building having concrete stairs curving and rising to aluminum and wooden doors entering the front of said building, having a peaked, green shingle roof, commonly known as 2514 West Haddon, Chicago, in the Northern District of Illinois, Eastern Division, there is now being concealed certain property, namely heroin and other controlled substances, United States Currency, weighing scales, packaging materials, books, papers and documents

relating to narcotics distribution, which are contraband, fruits, instrumentalities and evidence relating to the crime of possession with intent to distribute and distribution of controlled substances; in violation of Title 21, United States Code, Section 84-1(a)(1).

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

(See attached affidavit)

Additional affidavit suppressed.

/s/ Joseph P. Peckos
Special Agent,
Drug Enforcement Administration

Sworn to before me and subscribed in my presence, De-
cember 16, 1976.

/s/ James T. Balog
United States Magistrate

76M247

December 16, 1976

State of Illinois
County of Cook—ss:

AFFIDAVIT

Joseph P. Peckos, Special Agent, Drug Enforcement Ad-
ministration, being duly sworn on oath, deposes and states:

1. Affiant has been an agent of the Drug Enforcement Administration for five (5) years during which time he has engaged in numerous investigations relating to violations of federal drug laws, including but not limited to those proscribing possession with intent to distribute and distribution of controlled substances.
2. On this date December 16, 1976, affiant was informed by Drug Enforcement Administration (DEA) Special Agent Harold Anderson that a Confidential Informant of

the Hartford, Connecticut Office of DEA assigned number 5826-0029 informed Agent Anderson that on December 15, 1976 Rafael Kercado-Rivera was informed that six (6) kilograms of heroin were available in Chicago, Illinois at \$28,000 per kilogram.

3 Agent Anderson further informed affiant that the confidential informant learned that Daisy Gonzales made reservations to fly to Chicago, Illinois on December 16, 1976 on Trans World Airlines, flight number 175 arriving at Chicago O'Hare International Airport at 11:00 a.m. C.S.T.

4. Affiant has been further informed that DEA agents observed Daisy Gonzales leave her home in Holyoke, Massachusetts during the morning hours of December 16, 1976 and travel to Bradley Field, Hartford, Connecticut where she was observed boarding flight number 175 of Trans World Airlines carrying a tan leather Escort suitcase and wearing black slacks, black turtleneck sweater, black cap and a white coat.

5. Affiant has been informed by Special Agent Robert Scheuler that he observed Daisy Gonzales arrive at Chicago O'Hare International Airport on Trans World Airlines flight number 175 at 11:00 a.m. C.S.T. Daisy Gonzales was observed to take a taxi to the Taco Loco Restaurant, 1601 North Western Avenue, Chicago, which she entered carrying the tan leather Escort suitcase.

6 Agent Scheuler further informed affiant that at approximately 12:15 p.m., an individual identified as Rafael Kercado-Rivera met with Daisy Gonzales at the Taco Loco Restaurant. Agent Harold Anderson further informed affiant that United Airlines manifests reflected that passenger "R. Rivera" travelled on flight 123 from Bradley International Airport, Hartford, Connecticut arriving at Chicago O'Hare International Airport at 7:45 a.m. C.S.T.

7. At approximately 12:45 p.m. DEA agents observed Rafael Kercado-Rivera and Daisy Gonzales leave the Taco

Loco Restaurant carrying the tan leather Escort suitcase, enter an automobile and drive to 3561 West Belden, Chicago where they entered at approximately 1:00 p.m. Rafael Kercado-Rivera was observed carrying the tan leather suitcase into the residence at the aforementioned address by Agent Scheuler.

8. At 1:30 p.m. DEA agents observed Rafael Kercado-Rivera leave 3561 West Belden carrying a brown paper bag, enter an automobile and drive to the two story brown and yellow residence at 2514 West Haddon, Chicago which residence Rafael Kercado-Rivera entered through the front door carrying the aforementioned brown paper bag.

9. At approximately 2:05 p.m. Agent Scheuler observed Rafael Kercado-Rivera leave the residence at 2514 West Haddon, Chicago carrying a white paper bag which he placed on the floor of the back seat of the vehicle he entered. Kercado-Rivera was then followed to the rear of 3561 West Belden where he was observed to park the automobile in the garage.

10. At approximately 2:25 p.m. Agent Scheuler observed Daisy Gonzales, Rafael Kercado-Rivera and an unknown male drive from the alley behind 3561 West Belden to the intersection of Leavitt and Milwaukee Avenue, Chicago where Daisy Gonzales and Rafael Kercado-Rivera left their vehicle and entered a taxicab. Rafael Kercado-Rivera was observed carrying the tan leather suitcase.

11. The taxi was followed to O'Hare International Airport where affiant observed Daisy Gonzales purchase a ticket to Hartford, Connecticut on Trans World Airlines flight 82. Daisy Gonzales checked the tan Escort leather suitcase to which was affixed baggage Claim number 229767 and boarded flight 82. Rafael Kercado-Rivera was also observed boarding flight 82. Daisy Gonzales was wearing a tan leather coat, a white cap and black slacks and had long blond hair.

12. Affiant was informed at 7:45 p.m. that DEA Group Supervisor Edward Noon arrested Daisy Gonzales in possession of a tan leather Escort suitcase at Hartford, Connecticut. A search of said suitcase revealed a white paper bag containing approximately one kilogram of a brown powdery substance. Special Agent Sloboda conducted a field test on said substance and observed a positive reaction for an opiate. The white bag bore the address 1443 N. Wells, Old Town, Chicago.

13. Affiant has personally observed the premises described above and commonly known as 2514 West Haddon Avenue, Chicago, Illinois.

/s/ Joseph P. Peckos
Special Agent,
Drug Enforcement Administration

Subscribed and sworn to before me
this day of December 1976.

State of Illinois
County of Cook—ss.

AFFIDAVIT

Joseph P. Peckos, DEA Special Agent being first duly sworn on oath, deposes and states as follows:

Hartford, Connecticut DEA confidential informant number SB 26-0029 is a court authorized wire tap which is still in operation on this date.

/s/ Joseph P. Peckos
Special Agent,
Drug Enforcement Administration

Subscribed and sworn to before me
this day of December 1976.

GROUP APPENDIX D

REPORTS CONCERNING COURT AUTHORIZED INTERCEPTS OF WIRE OR ORAL COMMUNICATIONS PURSUANT TO TITLE 18, UNITED STATES CODE, SEC. 2519

TABLE A-1

UNITED STATES DISTRICT COURTS

UNITED STATES DISTRICT COURTS

CALENDAR YEAR 1976

REPORTS BY JUDGE

REPORTS BY PROSECUTING OFFICERS

Reporting Number	District and Judge	Agency	Offense Specified	Type of Intercept (Location)	Date of Application	AUTHORIZED LENGTH			SUMMARY OF COSTS					SUMMARY OF RESULTS			
						Original Order	Number of Days	Total Length (Minutes)	Number of Intercept	Intercepted	Intercepted per Day	Percent Intercepted	Intercepted	Intercepted	Intercepted	Percent Intercepted	Intercepted
MASSACHUSETTS																	
47.	Blumer	Levi	Gambling, conspiracy	PW	Q*	12-12-76	20	-	20	16	37	48	597	6,500	125	-	-
48.	Garrity	Levi	Racketeering, conspiracy	PW	Q, A	1-30-76	20	-	20	9	8	10	40	7,841	740	-	-
49.	Murray Garrity	Levi	Marcotice	PW	B	3-21-76	20	1	40	35	30	208	1,058	43	27,874	7,155	-
50.	Thuro	Levi	Marcotice	Q*	Q*	8-24-76	20	-	20	14	4	30	59	1	12,806	-	-
51.	Frederick	Thornburgh	Marcotice	PW	B	12-2-76	20	-	20	21	7	-	-	-	-	-	-
MICHIGAN, EASTERN																	
52.	Churchill	Levi	Gambling, conspiracy	PW	A	12-24-76	20	-	20	18	39	16	709	326	10,206	376	-
53.	Kennedy	Levi	Obstruction of justice, forgery, conspiracy	PW	B	1-14-76	20	-	20	20	36	13	714	64	7,450	200	-
54.	Kess	Levi	Subsistence & theft (interstate or foreign shipments by carrier), conspiracy	PW	B	6-23-76	20	-	20	20	55	5	1,103	15	7,089	280	1
55.	Thornon	Levi	Marcotice	PW	A	5-21-76	20	-	20	20	9	69	190	93	25,040	7,943	-
56.	Frett	Levi	Gambling, conspiracy	PW	B, Q*	5-24-76	20	-	20	20	31	6	614	123	11,844	544	-
57.	Dekasio	Levi	Gambling, conspiracy	PW	B, Q*	6-13-76	20	-	20	7	18	14	18	18	18	18	-
58.	Churchill	Crampton	Marcotice	PW, Q*	Q*	6-28-76	20	-	20	20	90	100	1,803	59	35,629	2,455	-
59.	Churchill	Levi	Gambling, conspiracy	PW	Q*	8-8-76	20	-	20	20	70	7	1,393	607	7,353	400	-
60.	Churchill	Levi	Marcotice	PW	B	9-8-76	20	-	20	13	102	90	1,321	49	21,151	2,389	2
61.	Kess	Levi	Racketeering, conspiracy	PW	B	10-14-76	20	-	20	20	63	20	1,243	46	7,428	320	-
62.	Freeman	Levi	Gambling, conspiracy	PW	B, A	11-3-76	20	-	20	20	223	25	4,459	3,830	12,806	600	-

Type of Intercept: Q* Electronic transmitter

Location: Q* Combination of apartment dwelling & business

Q** Automobile; Q*** Motor home

Q**** Automobile; Q***** Motor home

TYPE: PW - Phone wire; ME - Microphone intercept; Q - Q-Code; ME - Not Reported

LOCATION: B - Single family dwelling; A - Apartment; M - Multiple dwelling; B - Business building; Q - Other

RE: JPM, Leflore, Johnson, Martinez, Villarreal

An Agency Cannot Justifiably Represent Each of the Reported Applications and is not-to-be used by providers of Title 18, U.S.C. Sec. 2516, specially designed for Automated Agency Control to authorize its filing

Type of Intercept: Q* Electronic transmitter
Location: Q* Combination of apartment dwelling & business
Q** Automobile Q*** Motor home

APPENDIX E

§ 11.16 *Extra Judicial Statements or Conduct— Generally*

Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of court, or after a crime has been committed, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

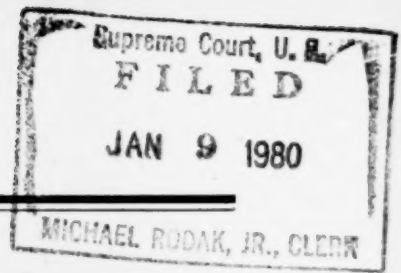
A statement or act or omission is “knowingly” made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether any statement or act or omission claimed to have been made by a defendant outside of court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex, training, education, occupation, and physical and mental condition of the defendant, and his treatment while in custody or under interrogation, as shown by the evidence in the case; and also all other circumstances in evidence surrounding the making of the statement or act or omission, including whether, before the statement or act or omission was made or done, the defendant knew or had been told and understood that he was not obligated or required to make or do the statement or act or omission claimed to have been made or done by him; that any statement or act or omission which he might make or do could be used against him in court; that he was entitled to the assistance of counsel before making any statement, either oral or in writing, or before doing any act or omission; and that if he was without money or means to retain counsel of his

own choice, an attorney would be appointed to advise and represent him free of cost or obligation.

If the evidence in the case does not convince beyond a reasonable doubt that a confession was made voluntarily and intentionally you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that a confession was in fact voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the confession.

No. 79-650



In the Supreme Court of the United States

OCTOBER TERM, 1979

HERMINIO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN C. WINKFIELD
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-650

HERMINIO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals was entered on August 17, 1979, and a petition for rehearing was denied on October 2, 1979. The petition for a writ of certiorari was filed on October 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's voluntary oral statements to DEA agents should have been suppressed because petitioner declined to sign a "waiver of rights" form before seeing a lawyer.

(1)

2. Whether the affidavit supporting a search warrant for petitioner's house established probable cause.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was fined \$25,000 and sentenced to a 15-year term of imprisonment.¹ The court of appeals affirmed.

In December 1976, Jose De Leon of Chicago, Illinois, called Rafael Kercado-Rivera in Springfield, Massachusetts, and arranged to sell him a kilogram of heroin.² On December 16, 1976, Kercado-Rivera and an accomplice named Daisy Gonzales met with De Leon in a house in Chicago. Minutes later, DEA agents saw De Leon leave that house carrying a brown paper bag and travel to petitioner's house. When he returned to the house in which Kercado-Rivera and Gonzales were waiting, he was carrying a white paper bag. Kercado-Rivera and Gonzales thereafter flew back to Hartford, Connecticut, where

¹ Petitioner was subsequently convicted on drug related charges in the United States District Court for the District of Massachusetts and was sentenced to another 15-year term of imprisonment, to run concurrently with the sentence imposed in this case. On October 9, 1979, the Court denied petitioner's petition for a writ of certiorari regarding his conviction in the District of Massachusetts. See *Cruz v. United States*, No. 78-1504.

² This conversation was monitored by DEA agents pursuant to a court-ordered wire interception.

DEA agents arrested and searched them, discovering a white paper bag containing a kilogram of heroin (Pet. App. 2a-3a; S.H. Tr. 88-113, 117-119, 123).

Information concerning the arrests and seizure in Connecticut was sent to DEA agents in Chicago, who promptly obtained a warrant to search petitioner's house. The agents executed the warrant that same evening. Upon entering the house, the agents placed petitioner in protective custody and asked him some preliminary questions. Petitioner confirmed that the house was his. In the search that ensued, the agents found more than 3.8 kilograms of heroin, drug paraphernalia, and a brown paper bag containing \$29,000 (Pet. App. 2a-3a; S.H. Tr. 17-18, 27, 88-89, 117, 161).

The agents arrested petitioner, informed him of his *Miranda* rights, and asked him to sign a waiver of rights form. Petitioner stated that he understood his rights but that "he would not sign any documents unless his lawyer was present" (S.H. Tr. 401, 413-415). The agents then advised petitioner that they wished to question him, that he was entitled to have his lawyer present, that he did not have to answer any questions until he consulted with his lawyer, and that he could stop the questioning at any time. Petitioner again acknowledged that he understood his rights and immediately thereafter he admitted that the heroin found in his home was his (Pet. App. 4a; S.H. Tr. 400-402, 413-415; Tr. 65-67, 112-113; Gov't Ex. 8).³

³ Petitioner did not testify at the suppression hearing. At trial, however, he claimed that he had never been informed

ARGUMENT

1. Petitioner contends (Pet. 22-24, 28-37) that, in light of his refusal to "sign any documents unless his lawyer was present" (S.H. Tr. 401), the courts below erroneously concluded that he voluntarily and knowingly waived his *Miranda* rights.⁴ But, as this Court made clear in *North Carolina v. Butler*, No. 78-354 (Apr. 24, 1979), slip op. 2-7 & n.5, the fact that petitioner refused to sign a waiver form does not preclude a finding of voluntary waiver. Such behavior "may indicate nothing more than a reluctance to put pen to paper under the circumstance of custody. A detainee may still wish to discuss the matter with his detainers for any number of reasons * * *." *United States v. McDaniel*, 463 F.2d 129, 135 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973); see, e.g., *United States v. Gardner*, 516 F.2d 334, 341 (7th Cir. 1975). Here, the record demonstrates that the officers twice informed petitioner of his rights, that petitioner stated that he understood those rights, and that petitioner nonetheless chose to admit his guilt.⁵

of his rights and that he had never admitted that he owned the heroin (Tr. 204, 293, 303).

⁴ Although petitioner arguably suggests that his Sixth Amendment right to counsel was also violated, that right "attaches only at or after the time that adversary judicial proceedings have been initiated against" the defendant. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

⁵ Petitioner also claims (Pet. 33-37) that the district court improperly charged the jury regarding the admissibility of

As petitioner points out (Pet. 22-24), there is a conflict among the courts of appeals as to whether a suspect who has previously invoked his Fifth Amendment right to counsel, but has not yet consulted an attorney, may ever waive his rights in response to custodial questioning. Compare, e.g., *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.) (en banc), cert. denied, 436 U.S. 919 (1978); *United States v. Grant*, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); and *United States v. Tafoya*, 459 F.2d 424, 427 (10th Cir. 1972), with *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979) (en banc) and *White v. Finkbeiner*, 570 F.2d 194 (7th Cir. 1978).⁶ That issue is not presented here, however, because petitioner never invoked his right to the presence of counsel. Rather, he stated only that he would not sign any documents unless advised by counsel. When the officers then asked petitioner whether he also

his confession. See 18 U.S.C. 3501. Petitioner initially submitted a different instruction on this point, but he expressly approved the instruction that was ultimately given (Tr. 263) and cannot now be heard to complain. In any event, the instruction adequately informed the jurors that they should consider his admission only after determining "whether he made those statements and, if so, whether he made them voluntarily and understandingly" (Tr. 388-389). Although the trial court properly instructed the jury that the government had to prove petitioner's guilt beyond a reasonable doubt (Tr. 389), no such burden exists with regard to the voluntariness of petitioner's confession. See *Lego v. Twomey*, 404 U.S. 477 (1972).

⁶ See also *Brewer v. Williams*, *supra*, 430 U.S. at 404-405 & n.11; *Michigan v. Mosley*, 423 U.S. 96, 101 n.7 (1975); *Maglio v. Jago*, 580 F.2d 202, 205-206 (6th Cir. 1978).

wanted counsel present before answering questions, petitioner indicated that he understood his rights and that he wished to make a statement. In these circumstances, the courts below properly found that petitioner had waived his rights (see, *e.g.*, *Nash v. Estelle*, *supra*, 597 F.2d at 517-520; *United States v. Rodriguez-Gastelum*, *supra*, 569 F.2d at 484 n.2), and further review of this essentially factual question is not warranted.⁷

2. Petitioner also argues (Pet. 38-40) that the affidavit supporting the search warrant misrepresented the nature of the confidential informant and the identity of one of petitioner's co-defendants. Pe-

⁷ In *United States v. Priest*, 409 F.2d 491 (5th Cir. 1969), the court of appeals concluded that the defendant, a 19-year old boy of limited education who was recuperating in a hospital, had expressly requested counsel when he stated that "he did not want to sign the [waiver] form *until* he had consulted with an attorney." 409 F.2d at 492 (emphasis supplied). The court therefore held that the confession that was thereafter extracted during interrogation in the hospital room was inadmissible. Here, in contrast, petitioner merely stated that he would not sign any document *unless* he consulted with an attorney, and, after he was again warned of his rights, he immediately made an inculpatory statement. In light of the difference in statements and circumstances between this case and *Priest*, and the recent decision of the en banc Fifth Circuit in *Nash v. Estelle*, *supra*, it seems likely that the Fifth Circuit would agree with the decision of the court of appeals in this case.

In any event, given the discovery of almost nine pounds of heroin in petitioner's house and the sale of heroin that had previously been observed, the admission of petitioner's statements was probably harmless error if it was error at all. See, *e.g.*, *United States v. Charlton*, 565 F.2d 86, 91-93 (6th Cir. 1977); *Null v. Wainwright*, 508 F.2d 340 (5th Cir.), cert. denied, 421 U.S. 970 (1975).

tioner contends that if these allegedly false portions of the affidavit were excised, then the redacted affidavit would not "support a finding of probable cause." See *Franks v. Delaware*, 438 U.S. 154, 172 (1978). The district court and the court of appeals specifically held, however, that the misstatements were immaterial and unintentional (Tr. 373; Pet. App. 3a), and there is no reason to review these concurrent factual findings. See *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967).

In any event, there is no merit to petitioner's claims. The affidavit did incorrectly refer to co-defendant De Leon as co-defendant Kercado-Rivera, but the mistake was an understandable one given the conditions of surveillance and the looks of the two individuals (Pet. App. 3a). Furthermore, that misidentification was completely immaterial to the issuance of the search warrant, since in either case the agents had seen one of the co-defendants pick up a package later found to contain heroin at petitioner's house. Similarly, the fact that the main affidavit described a wire interception as a confidential informant was also immaterial.⁸ In addition, the agents filed a supplemental affidavit informing the magistrate that the informant was in fact court-authorized electronic surveillance (Pet. App. 12a).⁹

⁸ That mistake did not exaggerate the degree of probable cause that actually existed, because the reliability of information obtained from a wire interception is at least as great as the reliability of an informant.

⁹ Insofar as petitioner attempts (Pet. 40-44) to challenge the interception on other grounds, we note that he was not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

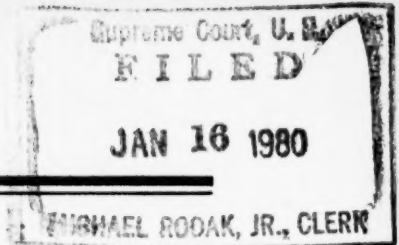
WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN C. WINKFIELD
Attorney

JANUARY 1980

a party to the intercepted conversation nor the object of the intercept order; he therefore has no standing to raise these claims. 18 U.S.C. 2510(11); 2518(10)(a). See *Alderman v. United States*, 394 U.S. 165, 176 (1969); *United States v. Williams*, 580 F.2d 578, 582-587 (D.C. Cir. 1978); *United States v. Fury*, 554 F.2d 522, 525-527 (2d Cir.), cert. denied, 433 U.S. 910 (1977); *United States v. Plotkin*, 550 F.2d 693, 695 (1st Cir.), cert. denied, 434 U.S. 820 (1977); *United States v. Calhoun*, 542 F.2d 1094, 1097-1098 (9th Cir. 1976), cert. denied, 429 U.S. 1064 (1977).



IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-650

HERMINIO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY MEMORANDUM FOR PETITIONER

ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863

*Attorney for Petitioner,
Herminio Cruz.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-650

HERMINIO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

REPLY MEMORANDUM FOR PETITIONER

Herminio Cruz, petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 603 F.2d 673 (C.A. 7, 1979).

JURISDICTION

The Opinion of the Court of Appeals for the Seventh Circuit was entered on August 17, 1979. A timely Petition for Rehearing was filed [after an extension allowed by the Court] on September 10, 1979. The Petition for Rehearing was denied on October 2, 1979. The petition was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment [self-incrimination] and Sixth Amendment [right to counsel] rights were violated where the trial court allowed a post-arrest oral admission into evidence where the evidence revealed that the petitioner was already in custody and had requested counsel . . . prior to the [controverted] oral admission?

1A. Whether a custodial request for counsel precludes the admission of the post-arrest statement in accordance with both *Fare v. Michael*, U.S., 99 S.Ct. 2560 (1979) and *North Carolina v. Butler*, U.S., 99 S.Ct. 1755 (1979)? [In *Butler* the Court noted that at no time did the respondent request counsel . . . 99 S.Ct. at 1756].

1B. Whether the Fifth Circuit *Miranda* interpretation in *U.S. v. Priest*, 409 F.2d 491 (C.A. 5, 1969), is correct [compelling suppression of post-arrest admission after request for counsel] and, if it is, does it so seriously conflict with the decision at bar that certiorari should be

granted to resolve the conflict of opinions within the circuits as to the proper application of *Miranda*?

2. Whether certiorari is appropriate to resolve the question as to whether the trial court must, consistent with 18 U.S.C. § 3501(a), instruct the trial jury on who has the burden of proof and what is the burden of proof where the government offers a controverted oral admission as evidence of guilt?

2A. Whether an instruction to the trial jury regarding a contested oral admission [post-arrest and without counsel] is complete and adequate under federal standards where the trial court declines to charge the proponent of the oral admission with any burden of proof whatsoever?

3. Whether an affidavit for a search warrant which contains serious material factual errors can survive review since *Franks v. Delaware*, 438 U.S., 98 S.Ct. 2674 (1978)?

3A. Whether petitioner was improperly denied "standing" to attack an affidavit for a search warrant where the affidavit contained information from a confidential informer . . . the confidential informer being an alleged court authorized wiretap . . . and where the United States Courts reported that the same wiretap was never installed?

3B. Whether the Court of Appeals committed error in declining to grant petitioner standing to attack an affidavit for a search warrant where the affidavit contained "electronic eavesdropping representations" under the theory that petitioner was not an "aggrieved person" as per 18 U.S.C. § 2510(11) but failed to challenge petitioner's standing to attack the same affidavit as a "person aggrieved" under Rule 41(e), Fed.R.Crim.Proc.?

ARGUMENT

I.

As regarding the confession questions presented in the instant decision (Questions 1-1(b)) the government agrees that "there is a conflict among the courts of appeals as to whether a suspect who has previously invoked his Fifth Amendment right to counsel, but has not yet consulted an attorney, may ever waive his rights in response to custodial questioning" (Gov. Brf., pg. 5). The government thereafter urges that certiorari be denied in that the claim by the government is that this petitioner sought counsel regarding "waiver forms" and not simply on whether or not questions would be answered at all. To this we suggest that the Court of Appeals for the Fifth Circuit squarely answered that the request for counsel regarding the signing of a waiver . . . is a request for counsel and:

"A finding of knowing and intelligent waiver of the right to an attorney is impossible" (*U.S. v. Priest*, 409 F.2d 491 at 493 (C.A. 5, 1969)).¹

The government's facts are less than accurate. For example, at page 3, n.3 the government's brief maintains that the petitioner did not testify at the suppression hearing. The government's brief in the Court of Appeals for the Seventh Circuit states:

"Cruz's testimony on the motion to suppress was that the *Miranda* warnings were not given and that he made no statement whatsoever" (Gov. Brf. in 7th Cir., pg. 18).

¹ Petitioner suggests that *Rhode Island v. Innis*, Cert.Grt'd, 99 S.Ct. 1277 (1979); 26 Cr.L. 4080 (1979) includes questions regarding right to counsel which are similar to those presented within the instant petition.

The government suggests that *in any event* the discovery of the heroin and the sale of heroin "that had previously been observed" renders the petitioner's post arrest statements "probably harmless error if it was error at all" (Gov. Brf. pg. 6, n.7).

The heroin sale of December 16, 1976, was not observed by anyone in that it apparently took place within the private premises that were later searched. In addition, the government offered absolutely no evidence that the petitioner was responsible for that sale. In fact, during the government's closing argument they suggested that it did not matter who was responsible for the heroin sale of December 16 . . . in that the possession of the heroin in the home on the night of December 16 was "constructive possession" and that, coupled with his admissions were the primary evidence of his guilt. It is startling to note that the admissions of the petitioner (controverted and post-arrest and without counsel) . . . INCLUDED NO ADMISSION AS TO A SALE OF HEROIN ON THE AFTERNOON OF DECEMBER 16, 1976.

II.

The government relegates *cert. questions* 2 and 2a to a footnote (Gov. Brf. pg. 4-5, n.5). The government, absent the benefit of authority, suggests that 18 U.S.C. § 3501 does not compel a "confession instruction" and, in any event, the government tells this court that Cruz, expressly "approved" the instruction that was ultimately given by the trial court. Regrettably the government misreads the trial transcripts of December 30, 1977. The petitioner objected to the Court's instruction on how the jury shall consider a confession after the trial court

refused the petitioner's original "confession" instruction.² The "confession" played a major role both in the government's case and at trial. It is not beyond reason to believe that a motion for judgment of acquittal would have been entered at the close of the government's case had there been no admission or confession. A proper instruction was mandated. The jury was not told that they must weigh the out of court statement with "caution" and the court in nowise directed that there was any burden of proof whatsoever regarding the alleged admission or confession. In *Lee v. Mississippi*, 332 U.S. 742 (1947) the Court held that even where the defendant denies the confession constitutional safeguards must apply in order that due process be fulfilled. The paucity of authorities in connection with 18 U.S.C. § 3501 strongly suggest that this case is appropriate for certiorari.

III.

The petitioner has pointed out in his opening petition that there is a substantial "standing" question presented in this petition. This Court is aware that petitioner had *standing* to attack the affidavit for the search warrant as a "person aggrieved" under Rule 41(e), Fed.R.Crim. Proc. The most glaring factual allegations in the affidavit for the search warrant (appended to the opening petition) relate to matters which were *apparently*³ part of a court authorized wiretap out of

² Petitioner had offered the trial court two (2) separate instructions, these included Devitt and Blackmar, 2nd Edition, #11.16, and a second instruction is now offered in the Devitt and Blackmar, 3rd Edition, #15.06.

³ Appendix D in the Petition for Certiorari shows that the U.S. Court Commission reported that the particular court

(Footnote continued on following page)

Massachusetts. The government claimed that this Court authorized wiretap was in effect on December 16, 1976. The petitioner was denied the right or opportunity to contest those portions of the affidavit relating to the "court authorized wiretap" because petitioner was not an "aggrieved person" as per 18 U.S.C. § 2510 (11). Petitioner has pointed out that there seems to be no difference as between "a person aggrieved" and an "aggrieved person". Nevertheless, the trial court declined to grant petitioner "standing" and indeed, denied the petitioner access to the eavesdropping materials based upon the fact that the trial court took the view that the petitioner was not an "aggrieved person" under 18 U.S.C. § 2510 (11). However, the trial judge did state:

"I regard this as a substantial question and certainly not one which has been raised frivolously by the defense. It is one that is not without difficulty". (Tr. 77)

* * * * *

"I am the first to say that I could well be wrong, and I know that I will not be the final word on this matter." (Tr. 80)

The opening petition, while suggesting that both the trial court and the appellate court erred in refusing to apply a proper "standing" status . . . urged that *U.S. v. Salvucci*, 599 F.2d 1094 (C.A. 1, 1979), provided abundant authority for petitioner's proposition that he was unreasonably denied "standing" to attack the under-

³ *continued*
authorized wiretap in this case was "never installed". For whatever reason, the government in their brief in opposition make absolutely no reference to this exhibit. The court authorized wiretap was either "operative or never installed". The petitioner has offered evidence that it was "never installed". No hearings have been held to determine the viability of the petitioner's claim.

lying electronic eavesdropping; same being a very material portion of the affidavit for the search warrant which was used to enter the private premises on December 16, 1976, in Chicago, Illinois, and seize the heroin which was the subject of the indictment in this case.⁴ Of course, on the execution of the search warrant the petitioner was arrested. His controverted post-arrest "admissions" flowed from the seizure and arrest. Thus the importance of petitioner's claim is not disputed by the government.⁵

As the government is now aware this Court granted certiorari in *Salvucci v. U.S.*, 100 S. Ct. (1979).⁶ Thus, the standing questions raised in our petition [and in both the district court and the Appellate Court] will undoubtedly be answered by the court's decision in *Salvucci*.

⁴ The affidavit for the search warrant is reproduced in the petition for cert. at Grp. App. "C"; pp. 8a-12a. Paragraphs 2 & 3 of the affidavit reflect information from a reliable informant. The reliable informant is a wire-tap . . . not a person. Whether the wire-tap was *court-authorized* is a *clear subject of dispute*.

⁵ If the search warrant falls, so does the balance of the evidence offered against the petitioner.

⁶ *U.S. v. Salvucci*, 79-244; cert. granted December 10, 1979.

CONCLUSION

Petitioner, Herminio Cruz, respectfully urges that his petition for certiorari be granted.

Respectfully submitted,

ALLAN A. ACKERMAN, ESQ.
100 North LaSalle Street
Suite 611
Chicago, Illinois 60602
(312) 332-2863

*Attorney for Petitioner,
Herminio Cruz.*

January 15, 1980